Supreme Court, U.S.
FILED
JUL 5 2001
CLERK

No. 00-1824

In The
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD McDOUGALL, Trustee,

Petitioners,

v.

THOMAS C. FULKERSON and DOLLY S. FULKERSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly decide, viewing all of the evidence in the light most favorable to Respondents, and drawing all reasonable inferences in their favor, that Respondents presented sufficient evidence from which a rational factfinder could conclude that Respondents' ownership of property leased under a long-term triple net lease was not a "trade or business"?

2. Given the procedural posture of the case, its fact-specific nature, the Seventh Circuit's adherence to long-standing Supreme Court precedent, and the absence of any actual circuit court conflict, is this an appropriate case for the exercise by this Court of its certiorari jurisdiction?

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STATEMENT OF THE CASE

Respondents present their own Statement of the Case because Petitioners selectively argue irrelevant facts, and ignore most of the facts in the District Court record which were centrally relevant to the Court of Appeals' decision. Moreover, Petitioners fail to discuss a number of procedural issues which the Court would wish to consider in deciding whether this case is ripe for certiorari review. Set forth below is a more complete account of the procedural history and the record facts of this case.

I. The District Court Proceedings

On January 25, 1999, Petitioners filed this action under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1001-1461 (collectively, "ERISA"). In part, that statute provides that an employer who withdraws from a multiemployer pension plan is subject to "withdrawal liability" in an amount equal to its proportionate share of "unfunded vested benefits."

Petitioners brought suit against Holmes Freight Lines, Inc. ("Holmes"), the withdrawing employer. They also sued Thomas C. Fulkerson ("Tom") and Dolly S. Fulkerson ("Dolly") (collectively, the "Fulkersons") based on a provision of ERISA that all "trades or businesses . . . under common control shall be treated as . . . a single employer" which are jointly and severally liable for any withdrawal liability incurred by any one member of the controlled group. 29 U.S.C. § 1301(b)(1) ("Section

1301(b)(1)"). Petitioners alleged that the Fulkersons' ownership of real property in Salt Lake City (the "Property"), leased pursuant to the terms of a long-term triple net lease, was a "trade or business," thereby subjecting the Fulkersons to personal liability for the alleged withdrawal liability incurred by Holmes.

On March 23, 1999, the Fulkersons answered the complaint and demanded a trial by jury. On April 18, 2000, after extensive discovery including 19 depositions and two conflicting experts' reports, Petitioners filed a motion for summary judgment on the "trade or business" issue. On the same day, Petitioners moved to strike the Fulkersons' jury demand. On May 25, 2000, without deciding the jury issue, and just 18 days before trial, the District Court granted Petitioners' motion for summary judgment. On June 2, 2000, the Fulkersons filed a motion for reconsideration, which was denied on June 8, 2000. On June 15, 2000, the District Court entered final judgment against the Fulkersons in the amount of $2,326,624.84, which forced the Fulkersons into bankruptcy.

The Fulkersons filed their Notice of Appeal on June 19, 2000, and their petition for relief in the United States Bankruptcy Court for the District of Arizona on June 27, 2000. On July 20, 2000, the Bankruptcy Court granted the Fulkersons relief from the automatic stay and permission to pursue an appeal to the United States Court of Appeals for the Seventh Circuit.

II. The Fulkersons' Appeal

On appeal, the Fulkersons argued that in granting summary judgment to Petitioners, the District Court erred in failing to interpret the phrase "trade or business" in accordance with the plain meaning of the statute. The Fulkersons further argued that the District Court committed reversible error by making several material procedural mistakes. For instance, the District Court ignored all of the relevant and admissible facts in the record favorable to the Fulkersons (including, among many other things, the testimony of their expert witness). The District Court misapplied the Seventh Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1373 (7th Cir. 1992), under which a District Court purportedly may "characterize" facts on summary judgment only if the facts are not in dispute, and there has been no jury demand. At the beginning of the case the Fulkersons demanded a trial by jury which Petitioners moved to strike just before trial, but the District Court expressly refused to decide whether the Fulkersons were entitled to a jury trial.

The Fulkersons explained to the Court of Appeals that the following record evidence was ignored by the District Court, and firmly established that summary judgment was improper:

(a) On average, Tom spent no more than five hours per year in connection with his ownership of the Property depositing a rent check once a month, and writing another check once a month to pay the mortgage.

(b) From the time of Holmes' incorporation in 1965 until it closed its doors 33 years later,

Tom was always the full-time President, spending 2,000 hours per year working for the company.

(c) Tom's "business" was Holmes.

(d) Tom made a passive investment in the Property as a retirement vehicle.

(e) Tom only visited the Property once, 15 years ago, before the terminal was built.

(f) Tom always reported the rental income from the Property on Schedule E, the schedule for "supplemental income," of the tax returns he filed with the Internal Revenue Service. Tom did not report that rental income on Schedule C, the schedule for "trade or business" income.

(g) Dolly did not sign either the original lease for the Property or the current lease.

(h) Tom and Dolly always had separate checking and savings accounts.

(i) All rent checks received from the Property were payable only to Tom, and not to Tom and Dolly.

(j) Tom deposited the rent checks in his personal bank account, and not into a joint account.

(k) Tom used money from his own personal account to purchase the Property, and to pay the mortgage.

(l) Dolly did not share in any of the profits or losses incurred with respect to the Property.

The Fulkersons also argued that the District Court improperly ignored, and later rejected, the testimony of

their expert witness. That testimony established that the economics of a passive stock or bond investment are directly analogous to the economics of Tom's long-term triple net lease of the Property. The District Court initially failed to consider this expert testimony, and on reconsideration rejected it, even though Petitioners never moved to exclude the testimony, and the District Court never engaged in the analysis required by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

III. The Ruling Of The Court Of Appeals

On January 29, 2001, after considering the extensive summary judgment record, the briefs of the parties, oral argument, and all relevant case law, the Court of Appeals (per Chief Judge Flaum) held that the District Court improperly granted summary judgment to Petitioners, and remanded for further proceedings consistent with its opinion. *Central States, Southeast and Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891 (7th Cir. 2001). In so doing, the Seventh Circuit noted that the District Court never decided the jury issue, and that because of its ruling with respect to Tom, the Court of Appeals did not need to reach the separate issues pertaining to Dolly. 238 F.3d at 894, 897 n.4.

On February 9, 2001, Petitioners filed their Petition For Rehearing with Suggestion for Rehearing En Banc. No judge in active service requested a vote with respect to the suggestion for rehearing en banc, and all judges on the original panel voted to deny rehearing. Accordingly, on March 9, 2001, the Petition for Rehearing was

denied. Ninety days later, the Petitioners filed their petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Yet Ripe For Review By This Court Because The Seventh Circuit Reversed And Remanded For Further Proceedings.

This is a summary judgment case that, in light of the factual record, has been reversed and remanded by the Court of Appeals for further proceedings consistent with its opinion. There are a number of unresolved issues which the District Court must address on remand including, but not limited to, the following: (a) the admissibility of the Fulkersons' expert witness testimony under *Daubert* and *Kumho Tire* if Petitioners move to strike that testimony (notwithstanding the Court of Appeals' reliance thereon); (b) the Fulkersons' right to a trial by jury under, among other cases, *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *Lorillard v. Pons*, 434 U.S. 575 (1978); and *Sheet Metal Workers Local 19 v. Keystone Heating and Air Conditioning*, 934 F.2d 35 (3d Cir. 1991); and (c) Dolly's intent to be Tom's partner in any alleged "trade or business" under, among other cases, *Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Steinberg*, 32 F.3d 269 (7th Cir. 1994).

Accordingly, this case is not yet ripe for certiorari review. *See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court.") *See also Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari

because the case had been remanded by the Court of Appeals for further proceedings and, therefore, did not present the type of final judgment generally awaited by the Court before it will exercise its certiorari jurisdiction). A decision to grant the petition for a writ of certiorari will not, under any circumstances, resolve all of the issues in this case.

II. This Is A Fact-Specific Case About Whether, Based Upon The Entire Record, A Rational Factfinder Could Conclude That Tom's Triple Net Lease Was Not A "Trade Or Business" And/Or That Dolly Did Not Intend To Be Tom's Partner.

This summary judgment case involves a determination of whether the Fulkersons presented sufficient evidence from which a rational factfinder could conclude that Tom's triple net lease is not a "trade or business," and that Dolly did not intend to be Tom's partner. These are highly fact-specific issues which can be resolved only after a thorough review of the extensive evidentiary record in this case – including more than a dozen deposition transcripts; sworn declarations of the Fulkersons, their expert witness, and others; and documentary evidence. The Court of Appeals has already reviewed the record in light of the standards set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) and, unlike the District Court, considered all of the evidence presented by both sides. That record and that standard compelled the Court of Appeals to reverse and remand for further proceedings.

Due to the procedural posture of this case, the nature of the inquiry, and the unique facts presented (e.g., Tom did not spend more than five hours a year in connection with the Property; Tom's business was to run Holmes; this triple net lease was equivalent to a passive investment in a stock or bond; Tom and Dolly always had separate checking and savings accounts; and Dolly did not share in the profits and losses from the Property), a decision by this Court would necessarily be fact-specific. Such cases are ill-suited for review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."); *Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440 (1918) (writ of certiorari dismissed as improvidently granted where primary issue was whether there was sufficient evidence in the record for a rational jury to find in favor of petitioners).

III. The Seventh Circuit's Decision Follows This Court's Well-Established "Plain Meaning" Jurisprudence, And Does Not "Misapprehend" Any Decision Of This Court.

The Court of Appeals' decision is in accordance with the well-established "plain meaning" jurisprudence of this Court. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well.") (citation omitted); *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 206 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary,

contemporary, common meaning.' "); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("The ordinary and obvious meaning of [a] phrase is not to be lightly discounted."); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

Notably, these "plain meaning" principles have been applied by this Court to the very statutory scheme at issue in this case. *Hughes*, 525 U.S. at 438 (interpreting provisions of ERISA in accordance with plain meaning of words used). Following the precedent of this Court, therefore, the Court of Appeals held that the phrase "trade or business" in Section 1301(b)(1) should be interpreted in accordance with the plain meaning of the words used. *Fulkerson*, 238 F.3d at 895 (citing *Hughes* and other "plain meaning" decisions of this Court). Curiously absent from the petition for a writ of certiorari is any mention of *Hughes* and this line of Supreme Court precedent, which are the foundation of the Seventh Circuit's decision.

Instead of acknowledging this Court's "plain meaning" jurisprudence and the Court of Appeals' faithful reliance thereon, Petitioners argue that the Seventh Circuit's decision "misapprehends" *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23 (1987), *aff'g* 771 F.2d 269 (7th Cir. 1985). That is not the case. Instead, the Seventh Circuit reaffirmed in *Fulkerson* its earlier decision in *Central States, Southeast and Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992) (a case won by these same Petitioners). Following *Personnel*, the Court of Appeals held that the *Groetzinger* analysis is

appropriate to determine the "trade or business" question under Section 1301(b)(1), because *Groetzinger* "comports with the common meaning of trade or business and thus can be used more generally." *Fulkerson*, 238 F.3d at 895.

This is not a "misapprehension" of Supreme Court precedent. To the contrary, *Groetzinger* specifically stated that the decision was based upon "what [the Court] regards as a common sense concept of what is a trade or business." 480 U.S. at 35. Thus, the Seventh Circuit has faithfully followed the jurisprudence of this Court.

IV. There Is No Circuit Court Conflict.

Like the Seventh Circuit in *Personnel*, and now *Fulkerson*, *Conners v. Incoal, Inc.*, 995 F.2d 245, 250-51 (D.C. Cir. 1993), also held that *Groetzinger* sets forth the appropriate test for determining whether an investment is a "trade or business" for purposes of Section 1301(b)(1). Instead of acknowledging the agreement between the Seventh Circuit and the D.C. Circuit on this issue, Petitioners allege a conflict between the Seventh Circuit and older cases from the Eighth and Ninth Circuits. There is, however, no actual conflict.

In *Bd. of Trustees of the Western Conference of Teamsters Pension Fund v. LaFrenz*, 837 F.2d 892 (9th Cir. 1988), the Ninth Circuit did not discuss the "plain meaning" jurisprudence of this Court or *Groetzinger*, which had been decided the previous year. Instead, after engaging in "an essentially factual inquiry," and in a holding limited to "the facts in this case," *LaFrenz* held, with virtually no statutory analysis, that leasing certain equipment was a "trade or business" under Section 1301(b)(1). 837 F.2d at

894, nn. 6 & 7. *Fulkerson* and *LaFrenz* do not constitute an actual circuit split where both cases were decided based upon their particular and very different fact patterns.

Similarly, in *Vaughn v. Sexton*, 975 F.2d 498 (8th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993), the Eighth Circuit held after a "factual inquiry" that a particular lease of real property was a "trade or business." In reaching this result, *Vaughn v. Sexton* rejected the defendants' arguments on the facts that their activities "were not continuous or regular enough to amount to the acts of a trade or business." 975 F.2d at 502, 503. In applying *Groetzinger*'s "continuous and regular" analysis to the particular facts at issue (although without citing *Groetzinger* itself), *Vaughn v. Sexton* is in accord with the D.C. Circuit's decision in *Conners v. Incoal*, and the Seventh Circuit's decisions in *Personnel* and *Fulkerson*. Petitioners may privately understand this because they did not cite *Vaughn v. Sexton* in either the District Court or the Court of Appeals.

There simply is no genuine circuit split.

CONCLUSION

In light of the factual record, the procedural posture of the case, the Court of Appeals' faithful adherence to long-standing Supreme Court precedent, and the absence of any actual circuit court conflict, there is no persuasive reason for this Court to grant review. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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